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No. 250

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

O. B. ELLIS, DIRECTOR
TEXAS BOARD OF CORRECTIONS,

Petitioner

v.

EDWARD MORGAN MACKENNA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioner, O. B. Ellis, Director, Texas Board of Corrections, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled cause on June 22, 1960, and Motion for Rehearing being denied on May 2, 1961.

Citations to Opinions Below

The memorandum opinion of the United States District Court for the Southern District of Texas is unreported and is printed in Appendix "B" here-

to, infra, p. 25. The first opinion of the United States Court of Appeals, Fifth Circuit, printed in Appendix "C" hereto, infra, p. 26, is officially reported as *MacKenna v. Ellis*, 280 F. 2d 592. The second opinion of the Court of Appeals is not yet officially reported, but is attached hereto as Appendix "E," infra, p. 68.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on June 22nd, 1960 and Motion for Rehearing was denied on May 2nd, 1961.

The jurisdiction of this Court is invoked under 28 U.S.C.A., Sec. 1254(1).

Questions Presented

1. Was there a short notice of the trial set for October 3 with the defendant being hauled into Court on a Friday after six months imprisonment and being notified that his trial would take place the following Wednesday, and if so, did such constitute a denial of due process?

2. Did the advancing of the trial date from Wednesday to Tuesday occur without notice and did it force defendant to trial at a time when he could not obtain any witnesses; and if so, did such constitute a denial of due process?

3. Was the defendant appointed inexperienced counsel, over his protest, and if so, did such constitue a denial of due process?

4. Did the relationship of the court-appointed attorneys to the District Attorney make it difficult or impossible for them to oppose the District Attorney's request that the case be moved up one day; and if so, did such constitute a denial of due process?

5. Were the court-appointed attorneys ineffective and did they apply properly for a continuance and did they conduct a half-hearted defense of the accused; and if so, did such constitute a denial of due process?

6. Was the trial court insensitive to the need for protecting the defendant from a hasty trial without notice or insensitive to obvious errors, if any, of court-appointed counsel; and if so, did such constitute a denial of due process?

Statute Involved

The statutory provision involved is Article 543 of the Texas Code of Criminal Procedure. It is printed in Appendix "A", infra, pages 23-24.

Statement

On November 3rd, 1955, the Respondents was observed by two Dallas police officers as he was exiting a bus depot in Dallas. Operating under a local suspicious persons" ordinance, he was searched and a key obtained from his pocket which opened the door of a deposit box in the bus depot. The officers found a camera which has been previously stolen, along with a case, of a value of $250.00.

After having been in the Dallas County jail since March 12, 1956, he was brought to the Criminal District Court No. 3, Dallas, Texas on September 28, 1956, whereupon he indicated he had no counsel although he had been negotiating with Mr. Henderson for his representation. Thereupon, the court appointed Mr. Collier and Mr. Tucker to represent him. Although they stated at the hearing of this cause in the U. S. District Court that the Respondent made no protest of such appointment, the Bill of Exception indicates that he did protest such appointment.

His trial was set for the following Wednesday, October 3rd, 1956, but on Tuesday, October 2nd, 1956, he was brought into court and informed that his trial had been advanced one day, and again he protested, according to the Bill of Exception. The Bill also indicates that he made a motion for continuance, but does not show the form or substance of such motion. (Both Collier and Tucker testified at the hearing in the U. S. District Court that no such motion was ever made to their knowledge.)

The Respondent was convicted of theft of personal property over the value of $50.00 and was sentenced to eight years confinement in the Texas State Penitentiary, where he is now incarcerated.

Respondent, acting *pro se*, appealed the judgment of conviction to the Court of Criminal Appeals of Texas. On April 3, 1957, the Court of Criminal Appeals affirmed the judgment of the Criminal

District Court *MacKenna v. Texas*, 301 S.W.2d 657.

On October 14, 1957, Respondent's Petition for Writ of Certiorari to the Texas Court of Criminal Appeals was denied. 355 U.S. 851.

On July 31, 1957, Criminal District Court No. 3, Dallas, Texas, denied, without hearing, an application by Respondent for writ of habeas corpus. *MacKenna v. Decker, Sheriff, Dallas County.*

On October 31, 1957, the Texas Court of Criminal Appeals denied, without hearing or opinion, Respondent's petition for writ of habeas corpus.

Subsequently, Respondent invoked the jurisdiction of the United States District Court for the Southern District of Texas by filing a petition for writ of habeas corpus.

On January 28, 1958, the United States District Court for the Southern District of Texas denied and dismissed Respondent's petition for writ of habeas corpus. Petition for rehearing was also denied and the court refused to issue a certificate of probable cause, or to grant leave to appeal in *forma pauperis.*

On the 31st day of March, 1958, Respondent was granted a certificate of probable cause and the right to appeal in *forma pauperis* by the United States Court of Appeals for the Fifth Circuit.

The United States Court of Appeals for the Fifth Circuit reversed and remanded the cause to the

United States District Court for the Southern District of Texas by opinion dated January 16, 1958. On March 20, 1959, Respondent O. B. Ellis' motion for rehearing was denied.

On June 29, 1959, the Petitioner's Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit was denied. *O. B. Ellis v. MacKenna*, 360 U.S. 935, 79, S. Ct. 1453.

A hearing was then held in the United States District Court for the Southern District of Texas, before the Honorable Joe M. Ingraham, in which the Respondent was denied relief and an order was entered denying Respondent's Application for a Writ of Habeas Corpus, Appendix "B".

The cause was again placed before the United States Court of Appeals for the Fifth Circuit, resulting in the cause being again reversed and remanded with directions to grant the Writ and discharge the Respondent, Cameron, Circuit Judge, dissenting. (Appendix "C".) The opinion was rendered on June 22nd, 1960, and judgment entered the same date, Appendix "D".

On July 7, 1960, the Court of Appeals entered an Order Granting Rehearing. On May 2nd, 1961, a majority of the Court of Appeals affirmed its opinion of June 22nd, 1960, Hutcheson, Cameron and Jones, Circuit Judges, dissenting. (Appendix "E".) Judgment was entered on May 2, 1961, Appendix "F", which was stayed by order dated May 26, 1961. (Appendix "G".)

What is regarded to be the principal holding of the majority of the court below appears in the June 22nd, 1960, opinion on page 50 of Appendix "C", as follows:

> "Disregarding what might have happened, and considering only what actually did happen, we find a combination of circumstances that unfairly prevented the accused from meeting the prosecution's case. The combination or circumstances we refer to are these: (1) the short notice of the trial set for October 3—the defendant hauled into court on a Friday after six months imprisonment and notified that his trial would take place the following Wednesday; (2) the advance in the trial date from Wednesday to Tuesday, without notice, forcing defendant to trial at a time when he could not obtain any witnesses; (3) the appointment of inexperienced counsel, over the protest of the defendant; (4) the equivocal relationship of these young attorneys to the District Attorney, making it difficult, if not impossible, for them to oppose the District Attorney's request that the case be moved up; (5) the lack of effective assistance of counsel—in failing to interrogate witnesses, in failing to take steps to have witnesses present at the trial, in failing to apply properly for a continuance, in bowing out with precipiate haste, and, generally in conducting what can be described only as a half-hearted defense of the accused; (6) the trial court's insensitivity to the need for protecting the defendant from a hasty trial without notice and from the obvious errors of inexperienced appointed counsel."

Reasons For Granting The Writ

Although habeas corpus cases seldom offer any precedential value for future cases, this case presents at least three important considerations which should persuade this Court to grant a Writ of Certiorari in this case, in addition to the need to correct an erroneous judgment below:

1. One of the primary functions of the Supreme Court is to supervise the disposition of cases in the lower courts. This case has been before the State trial court twice, the Texas Court of Appeals three times, the United States District Court twice, the United States Court of Appeals for the Fifth Circuit three times and now, for the third time, the United States Supreme Court. The divergent views of the several judges who have examined the Record of this cause is best reflected by the vigor of the five separate dissenting opinions in the Court of Appeals. This fact alone indicates a need for this Court to resolve the issues of this case and, in so doing, to guide the lower courts in the disposition of future cases of this nature.

2. Again, as reflected by the dissenting opinions, the Court of Appeals has abused its discretion in reversing and remanding this cause and, in particular, in overturning the facts found by the U. S. District Court.

The court below has said it should not set aside the judgment of the lower court in habeas corpus "except for the most impelling of reasons essential

to the preservation of federal constitutional rights." *Hensley v. Ellis*, 228 F. 2d 657 (5th Cir. 1956). In an appeal from an order by a United States District Court denying a writ of habeas corpus and finding petitioner has not been deprived of due process of law, it has been uniformly held that the lower court order must be sustained where such finding was supported by substantial evidence and was not clearly erroneous. *Macomber v. Hudspeth*, 115 F. 2d 114 (10th Cir. 1940) cert. den. 313 U.S. 558; *Williams v. Dowd*, 153 F. 2d 328 (7th Cir. 1946); *Moses v. Hudspeth*, 129 F. 2d 279 (10th Cir. 1942) cert. den. 317 U.S. 665; *Beckett v. Hudspeth*, 131 F. 2d 195 (10th Cir. 1942); *U. S. ex rel Cook v. Dowd*, 180 F. 2d 212 (7th Cir. 1950), certificate granted and order of Court of Appeals discharging respondent from custody vacated and cause remanded, 340 U.S. 206.

When the District Court refused to afford respondent any relief and he appealed from this refusal, the duty of any United States Court of Appeals was to consider the appeal within their prescribed bounds. Rule 52 (a) of the Federal Rules of Civil Procedure is applicable, Fed. R. Civ. P., 81(a)(2); *Albert ex rel Bucie v. Patterson*, 155 F. 2d 429 (1st Cir. 1946), and prescribes the scope of this review when it provides that "Findings of fact shall not be set aside unless clearly erroneous." It is submitted that there is no evidence whatsoever that the decision of the District Court for the Southern District of Texas was clearly erroneous. *Farrell v. Lanagan*, 166 F. 2d 845 (1st Cir. 1948) cert. den. 334 U.S. 853, reh. den. 335 U.S. 839

(holding that the United States Courts of Appeals cannot set aside findings of fact made by a Federal District Court in habeas corpus proceedings unless such findings are clearly erroneous). See also, *Kelly v. Johnston*, 128 F. 2d 793 (9th Cir. 1942) reh. den. 318 U.S. 798; *Albert ex rel Bucie v. Patterson*, 155 F. 2d 429 (1st Cir. 1946), cert. den. 329 U. S. 739, reh. den. 329 U.S. 827, (holding that in habeas corpus proceedings the United States Courts of Appeals cannot set aside a Federal District Court's disposition of the case if that District Court makes no findings of fact unless the Court of Appeals can find no reasonable basis for the decision anywhere in the record).. See also, *Sullivan v. Hunter*, 141 F. 2d 7 (10th Cir. 1944); *Schita v. Cox*, 139 F. 2d 971 (8th Cir. 1944) cert. den. 322 U.S. 761, reh. den. 323 U.S. 810; *Alexander v. Johnston*, 137 F. 2d 712 (9th Cir. 1943); *Macomber v. Hudspeth*, 115 F. 2d 114 (10th Cir. 1940) cert. den. 33 U.S. 571; *Pers v. Hudspeth*, 110 F. 2d 812 (10th Cir. 1940).

It is respectfully requested that this Honorable Court adhere to the ruling in the *Hensley* case, *supra*, and follow the settled precedent of *Macomber v. Hudspeth*, *supra*, *Farrell v. Lanagan*, *supra*, and other numerous cases, a few of which have here been cited, and not attempt to determine whether or not Respondent was denied due process, but leave that function solely in the Federal District Court unless such determination is clearly erroneous, which in this case, it is not.

As for the policy of reversing such cases as this and discharging one from prison who has been

duly and legally convicted by the State courts, the three dissenting opinions adequately identify the many problems caused by such reversals.

3. Of grave importance is the effect that the opinion of the Court of Civil Appeals will have on both State judges and members of the Bar, particularly the younger members, on the appointment of counsel to represent persons accused of a criminal act. This will be further developed later in the opinion.

The Record reflects that Collier and Tucker, recent graduates of the Southern Methodist University Law School, were appointed to represent the Respondent in a criminal prosecution against him for theft of a camera. Upon their first introduction to the facts, by the Respondent, these attorneys promptly recognized two important points in the case: (1) that the defendant had seven prior felony convictions, which must be concealed from the jury, and (2) that the only evidence of a crime, (the camera) may possibly have been illegally seized by the arresting police officers. The latter point was pursued to the degree of consulting their criminal law instructor at their Law School together with their own research. The result was reached that the evidence (the camera) had been, in fact, illegally obtained; thus being inadmissible, or if admitted over proper objection: reversible error.

The other important observation — the need to keep the defendant's character out of issue so that his seven previous convictions could not be brought to the jury by the prosecution—was quickly resolved

by deciding not to put the defendant on the witness stand.

These points were discussed with MacKenna who readily recognized the concern of his two attorneys and agreed that their proposed method of defense was wise and sage.

Trial was begun one day early, with the consent of these two court-appointed attorneys. During the trial, the defendant took it upon himself to take command of the ship carrying his defense. It is at this stage of the proceedings that the Respondent himself tied the noose which was to hang him (figuratively): he took the witness stand. This attempt at glibness, occasioned by his being over-impressed with his legal knowledge, rebounded immediately when, of his own volition, he admitted possession of Squire Haskin's camera (thus waiving any objection he may have had to an illegal search and seizure) and placed his character in issue, resulting in the jury's attention being focused on his seven prior convictions, rather than his outlandish tale of "finding the camera.' '

It should be noted that the Respondent alleges and the Court finds him to have been sui juris and mentally competent. Upon examination of the Record, however, doubt is cast upon such a fact. The Respondent is allegedly a graduate of Northwestern University and possesses a not-to-be-denied journalistic ability. Does this make him sui juris, at least for purposes of conducting his own defense?

Impressive as college diplomas are, such does not qualify or automatically confer some mysterious perception into legal problems. No better example could be found than the instant case. The Respondent had the services of two attorneys who did more to help him and went to more trouble themselves than most older and more experienced court-appointed attorneys would have bothered to do. But did he follow their advice? Not only did he not follow their advice, but in so doing, upset all of their plans and at such a time when his mistakes could not be corrected or offset.

Was MacKenna sui juris to the extent of maintaining his own defense? He tried, and the results indicate doubt about his ability to manage his own affairs—at least from the legal standpoint. How could a man who is a seven-time loser in the felony courts of several states be expected to manage anything when he can't control his own life. Certainly, these seven lessons in law do not qualify him to handle anyone's case — particularly this one in Dallas.

What harm resulted from the Respondent's trial date being set on a Friday for the next Wednesday and later advanced another day? He had competent court-appointed counsel to represent him, who had adequate time to prepare the case (at least they said so, and, until now, the [illegible] contra. No witnesses were [illegible] were no witnesses. [illegible] Respondent's case was [illegible] that no witness would be [illegible]

would not take the witness stand, thus relying upon the ability of his two attorneys to cross-examine the State's witnesses, to argue his case to the jury, and to exclude the camera from evidence. There was no necessity for character witnesses as such was not, at the time, to be an issue in the case. Viewing the case at that time, there was no reason why the Defendant or his attorneys would object to an advancement of the trial date, for they could cross examine the State's witnesses and argue their case on Tuesday, as well as Wednesday.

Much has been written by the parties and the Court concerning the appointment of Collier and Tucker to represent the Respondent and his alleged objection thereto. Although the Record reflects a great deal of doubt as to whether such an objection was made, the Bill of Exceptions seems to preclude further questioning such fact. The majority opinion finds error in "appointing *incompetent* Counsel over his objection."

It is well established that both Collier and Tucker were recent S.M.U. Law School graduates and their experience was rather limited. Neither can it be denied that they lacked the necessary experience to cope with complicated questions ensnarled with many legal problems, but such is not the case here. Whether in another and more complicated case, their representation would have satisfied the requirements of the due process clause is only academic; for such is not the instant case. This was a simple, ordinary theft case. The question is whether their representation in this case was suf-

ficient, and no better test can be found than the familiar hindsight test.

What did these two attorneys do to merit the wrath of MacKenna? What did they do to cause MacKenna to be denied due process? No practicing attorney in this State, nay, no law student, would fail to portend the perilous result of allowing him to take the witness stand: this, they recognized. Neither has the Respondent alleged, nor has the Court of Appeals discovered, any specific error made by Collier and Tucker, save that unfortunate day they fell victims to being appointed, without pay, counsel for Edward Morgan MacKenna, subsequently resulting in their names, ability, character and reputation being doubted and clouded through our federal courts.

It is against all logic and human nature to find a conflict of interests simply because they had made application for employment with the Dallas District Attorney's Office. What better way could be found to impress their prospective employer than to make a "good showing" in a case against him as court-appointed counsel? Is this to be taken as a holding that any newly-graduated lawyer who makes application for employment with a state agency or private practitioner, thereby precludes himself from representing a client against such prospective employer. because there would be a conflict of interests?

There is no evidence, nor specific allegations of instances where Collier and Tucker failed to exhibit that vigor and tenacity which any client, as well as

the due process clause, would demand or expect from their attorney. To infer that their "relationship" with the D.A.'s office precluded such vigorous and attentive representation, or that there might have been the slightest bit of collusion, beyond the common courtesies an attorney expects from his adversary, is utterly fantastic and certainly against logical reasoning.

They had developed a good defense for him which he refused. Nothing was done by them to prejudice the Respondent's position in the trial, nor was anything done which proved to be prejudicial to his cause after he took command of his defense. Even the Respondent complimented them in the jail after the trial for their handling of the case and now recognizes his present predicament is a result of his own error.

Collier and Tucker did not handle the appeal of the case, as they were not obligated to do so. But they did review the record and they found that any appeal would be fruitless. Applying the hindsight test, this conclusion was sustained as being correct by the Texas Court of Criminal Appeals, the U.S. Supreme Court and the U.S. District Court in Houston. There were no errors which had not been waived, no new evidence, and no need for an appeal. This is just another example of the expert advice received by the Respondent.

During the hearing in the U.S. District Court, the Respondent, through his attorney, waived his grounds for complaint on the matter of the ap-

pointment of Collier and Tucker. This precluded the Petitioner from further developing their competence and foreclosed the issue, or so Petitioner thought. It is noted that Mr. Golding represented Appellant there and, until now, Respondent appears relatively satisfied with such representation.

It might be suggested that even though Collier and Tucker were appointed to represent the Respondent, as a matter of fact they did not. Actually, they did no more than advise him of his legal position, which advice he did not heed, but proceeded through the trial as he himself desired and thought best. The appointment of Collier and Tucker by the State Court, in and of itself could not be a denial of due process, only their actions in conducting his defense could be scrutinized for this purpose; but here, if they did "handle his case," such representation fulfilled all requirements of due process.

The holding of the Court of Appeals with reference to the appointment of Collier and Tucker constitutes one of the most compelling reasons for this Court's granting this Writ of Certiorari.

It is axiomatic that the younger members of the Bar comprise the principal source of court-appointed defense work. The opinion of the court below casts serious doubt on their competency to serve, no matter how dedicated or effective they approach their task. If this opinion remains as it presently stands, many young attorneys will be reluctant to serve in the future and many courts will feel constrained

to select more experienced members of the Bar. This would easily result in less representation available to indigent defendants, as well as less vigorous and effective representation.

The courts of Texas, as well as the Legislature, have shown a tendency in recent years to expand the policy of providing an accused too poor to engage his own attorney, with adequate representation. See *Moore v. State*, 324 S.W.2d 879. It is well known that the older and more experienced attorneys avoid such service, leaving only the younger members of the Bar available. If the older attorneys were further shackled with the obligation of such service, considering their other clients and obligations, the time they would devote to such service would be a minimum. On the other hand, however, it is well known that the younger and less experienced members of the Bar have more time and exert a more vigorous effort to overcome their inexperience and in most cases offer better representation than their older colleagues.

Moving on to the questions surrounding a Motion for Continuance, it should be noted that the law is clear, as stated in the majority opinion, that the alleged error if any, was not preserved. Yet, fault is found in the Record.

Here the majority opinion exhibits inconsistency; holding the Bill of Exceptions to be binding upon the State with reference to the appointment of Collier and Tucker, but at the same time holding that the Bill of Exceptions was not binding on Respondent as to the Motion for Continuance.

Collier and Tucker testified and Judge Ingraham so found, that: (1) No Motion was made, and (2) there were no grounds for such Motion, (3) no fact witnesses were ever mentioned, and (4) if a Motion was made it did not conform to the requirements of the Texas Statute, Article 543 (Appendix "A").

The Respondent never mentioned any witnesses to his two attorneys, other than character witnesses. No fact witnesses were mentioned, nor, to this day, has MacKenna found any fact witnesses. He asserts June Chapman, the bookkeeper at the business establishment where he was employed, could establish an alibi. All she could say, as seen in her deposition, was that he was on the job until 4:35 p.m. of the day in question. The camera could easily have been pilfered after this hour so June Chapman could add nothing. Respondent's wife at first said he spent each evening with her, including the evening in question. But later, in her deposition, she was not willing to testify so emphatically—in fact, she did not remember:—See questions and answers 11, 12 and 13 of her deposition—so her testimony would have added nothing.

The only witnesses mentioned were character witnesses. It had been previously determined and agreed to by Respondent that he would not place his character in issue. Were Collier and Tucker incompetent in not foreseeing that MacKenna would take charge of his defense and change his mind on this point? Should they have had these character witnesses there in the event such happened?

Why should a Motion for Continuance have been made? There was no reason to delay Respondent's trial or even to resist advancing it one day. In fact, there was good reason why he should go to trial as soon as justice would allow—he had been in jail for over six months.

Even if such Motion had been made, and assuming that it was properly made, there certainly would have been no abuse of discretion by the Trial Judge had he refused to grant it; for there were no witnesses who could and would testify on some germane issue in the case. At this point, his character was not germane because he would have had to admit, at that time, that he did not plan to place his character in issue. Once again, applying the hindsight test, no error occurred, or if there was error it was merely harmless and academic.

To say that several witnesses were contacted is against the testimony of Collier and Tucker and the findings of the District Court below, unsupported by any Bill of Exceptions.

Conclusion

No other result can obtain than that Respondent received more than pro forma representation: in fact it was expert, vigorous, whole-hearted and loyal advice from competent attorneys with which he was satisfied until he had been incarcerated in the State Peniteniary for some time. He was accorded a speedy but fair trial unblemished with any question of denial of due process and justice

was attained, save one possible exception: the length of the sentence, which was occasioned solely by the Respondent's own error. It is submitted that any remorse or regret that might arise from a close examination of this Record must quickly be dismissed as being self-induced and precipitated by the fault of the complainant, the one upon whom our sympathies are bestowed. He proved to be his own worst enemy.

It is submitted that this whole tale of woe is a product of a mind twisted by overindulgence in alcohol and years of imprisonment coupled with a remarkable (for habeas corpus cases) presentation of the complaint. Some dissatisfaction with his court-appointed attorneys (though not apparent from the Record), four years of brooding in the State Penitentiary over his mistakes in taking over the case, would cause many to "remember" things they thought happened, or imagine actual events out of proportion.

Many of the fact and legal conclusions are based upon the uncorroborated and unsupported testimony and contentions of a man who had been convicted of dishonesty and untruthfulness seven times. In fact, many such conclusions are contrary to the findings and oral opinion of the U. S. District Court and the testimony of the only two witnesses in the case, whose character and veracity are unquestionable.

Without belaboring the point too much, suffice it to say that this opinion, if allowed to stand, will

have far-reaching effects and extend the jurisdiction of federal courts to question State Court criminal proceedings beyond that contemplated by the Constitution.

For the foregoing reasons and those stated in the three dissenting opinions, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

WILL WILSON
Attorney General of Texas

JOHN L. ESTES
Assistant Attorney General

Affidavit of Service

Before me, the undersigned authority, this day personally appeared John L. Estes, Assistant Attorney General, known to me to be the person whose name is subscribed to the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, who, having been duly sworn, did depose and on oath state that in accordance with Rule 33, U.S.C.A a copy of this Petition for Writ of Certiorari has been served upon Edward Morgan MacKenna by depositing the same in the United States mails, with First Class Certified Postage prepaid, addressed to Edward Morgan MacKenna, Route 1, Box 1, Huntsville, Texas.

JOHN L. ESTES
Assistant Attorney General

Subscribed and sworn to before me this ..... day of

....., 1961.

_____
Notary Public in and for
Travis County, Texas

Appendix "A"

Texas Code of Criminal Procedure, Article 543:
In the first application by the defendent for a continuance, it shall be necessary, if the same be on account of the absence of a witness, to state:

1. The name of the witness and his residence, if known, or that his residence is not known.

2. The diligence which has been used to procure his attendance; and it shall not be considered sufficient diligence to have caused to be issued, or to have applied for a subpoena, in cases where the law authorized an attachment to issue.

3. The facts which are expected to be proved by the witness, and it must appear to the court that they are material.

4. That the witness is not absent by the procurement or consent of the defendant.

5. That the application is not made for delay.

6. That there is no reasonable expectation that attendance of the witness can be secured during the present term of court by a postponement of the trial to some future day of said term. The truth of the first, or any subsequent application, as well as the merit of the ground set forth therein and its sufficiency shall be addressed to the sound discretion of the court called to pass upon the same, and shall not be granted as a matter of right. If an application for continuance be overruled, and the defendant con-

victed, if it appear upon the trial that the evidence of the witness or witnesses named in the appplication was of a material character, and that the facts set forth in said appplication were probably true, a new trial should be granted, and the cause continued or postponed to a future day of same term.

Appendix "B"

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

EDWARD MORGAN MACKENNA
Petitioner
vs.
O. B. ELLIS, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS
Respondent
CIVIL ACTION 11,297

ORDER

Came on to be heard on the 6th day of August, 1959, the above numbered and entitled cause, which hearing was held in obedience to and in accordance with the opinion of the United States Court of Appeals for the Fifth Circuit in Cause No. 17,213 rendered on January 16, 1959.

The Petitioner, Edward Morgan Mackenna, appeared in person and through counsel; the Respondent appeared through counsel. The Court, having heard the evidence and having examined the record, is of the opinion that the Petitioner, Edward Morgan Mackenna, is not entitled to the relief sought in his petition for the writ of habeas corpus.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the relief sought in Petitioner's petition for writ of habeas corpus be and the same is hereby in all things denied.

Entered this day of , 1959.

United States District Judge

Appendix "C"

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 18110

Edward Morgan MacKenna,
Appellant,

versus

O. B. Ellis, Director, Texas Department of Corrections,
Appellee.

Appeal from the United States District Court for the Southern District of Texas.

(June 22, 1960.)

Before RIVES, Chief Judge, and CAMERON and WISDOM, Circuit Judges.

WISDOM, Circuit Judge: This case is before us for the second time on an appeal from a denial of the writ of habeas corpus. See MacKenna v. Ellis, 5 Cir., 1959, 263 F.2d 35.

Edward MacKenna was sentenced to eight years imprisonment for the theft of a camera valued at $250. Since March 12, 1956, he has been confined

in the Dallas County Jail and in the Texas Penitentiary.

MacKenna is an educated man, a graduate of Northwestern University in 1934. He has worked as a reporter for a number of newspapers and has been a feature writer for several periodicals. But Edward MacKenna has seven convictions for crimes. He attributes his commission of these crimes to his having been an alcoholic. Since 1953 he has been a member of Alcoholics Anonymous.

Consistently, vigorously, and for the most part on his own, MacKenna has asserted that he did not steal the camera. His story is that at the Dallas State Fair in October 1955 he came into possession of the camera inadvertently.[1] An acquaintance whom he had known in the Texas Penitentiary left it at one of the stands on the midway where both had been sitting. MacKenna picked it up with the intention of returning it. Somewhat later he discovered the name and address of a commercial photographer

[1] There is confusion as to the date of MacKenna's visit to the State Fair. The evidence is undisputed that the camera was stolen the afternoon of October 18, 1955, from an automobile parked at the State Fair. According to the original record, MacKenna testified that he came into possession of the camera Sunday, October 13, 1955. In the earlier MacKenna case, Judge Hutcheson, dissenting, pointed out the discrepancy in dates as evidence of MacKenna's untruthfulness. In the hearing below, MacKenna insisted that "October 13" was a typographical error. MacKenna's former wife, in her deposition, stated that she picked up MacKenna every afternoon after work, including the afternoon of October 18, 1955, and that the only time he or they were at the State Fair was on a Sunday. October 13, 1955 was a Thursday. October 18, 1955 was a Tuesday.

on the camera case, making him realize that he had stolen property on his hands. This presented a serious problem: MacKenna was on a Governor's pardon from the Texas Penitentiary at the time. He was afraid to return the camera as an honest man might, for fear that he would be accused of the theft. After several days of searching thought, so he says, he decided to place the camera in a rental locker and mail the key to the owner. November 3, 1955, he brought the camera to the Union Bus Terminal in Dallas, placed the camera in a locker, pocketed the key, and stepped into an adjacent drugstore to buy a special delivery stamp. Upon leaving the drugstore, he was arrested by two Dallas policemen, one of whom knew him by sight and name. He was searched. The locker key was found. The policemen opened the locker, found the camera, took MacKenna to the Dallas Jail, and booked him for the theft of the camera.

This, of course, may be just another likely story. Then again, MacKenna may be a victim of circumstances. Likely or unlikely, it is basic to due process that an accused person have a fair oppportunity to tell his story in a fair trial. He is entitled to such notice of trial that he will be able to present his witnesses in court on the day of the trial. He is entitled to the effective, whole-hearted assistance of counsel and to the undivided loyalty of counsel. Finally, he is entitled to have his trial guided by a judge sensitive to the duty of protecting the accused's constitutional rights in all cases, but especially in a case when fledgeling lawyers are appointed counsel over the protest of the accused.

MacKenna was committed to the Dallas County Jail on March 12, 1956. Three times in the next six months, in April, May, and July, his name appeared on the official court docket for appearance to answer the indictment. Without apparent reason and without any explanation he was not taken into court on any of these occasions.

Friday, September 28, 1956, after six months and seventeen days in the county jail, MacKenna, for the first time, was taken to court. The district judge asked if he had counsel. MacKenna replied that he was negotiating with a Mr. Ben Henderson to represent him: at the hearing below he testified that he had managed to get together $150 for a retainer, and that Mr. Henderson had agreed to go by the jail and see him in late September. The trial judge stated that he did not see Mr. Henderson in court and that he was then and there appointing counsel to represent the defendant.[1] He appointed two young attorneys just out of law school.

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[1] At the time of the trial, Texas courts held that due process required the appointment of counsel only in capital cases; in contested cases involving non-capital felonies appointment of counsel was left to the discretion of the trial judge. See Holton v. State, Tex. Cr. App., 1942, 158 S.W.2d 772, cert. den. 316 U.S. 703. Moore v. State, Tex. Cr. App., 1959, 324 S.W.2d 879, requires appointment of counsel in all felony cases.

Generally, "the right of [an accused] to be heard through his own counsel [is] unqualified". Chandler v. Fretag, 1954, 348 U.S. 3, 75 S.Ct. 1, 99 L.Ed. 4. In Mackenna v. Ellis 5 Cir., 1959, 263 F.2d 35, 40, we held: "Here, however, more than six months after his arrest and when there was no claim that he was prevented from communicating with counsel, he had reached only the negotiating stage. It was not error for the court to proceed without such counsel."

An important issue in the case is whether MacKenna objected to the appointment of counsel. His appointed counsel, who were present in court, state that he did not object, at least, not in their presence. Exception 1 of the formal bills of exception filed in the state court appellate proceedings states, in part:

> "The Court asked defendant if he had counsel to represent him. Defendant replied he was negotiating with counsel of his own choice to handle the case. The Court then informed defendant that it was appointing counsel, and, *over protest*, proceeded to do so. Then and there, in open Court, the *defendant took exception to the action.*"

The bills of exception were submitted to counsel for the state and certified as correct by the trial court.

MacKenna's trial was set for Wednesday, October 3, 1956. A week-end therefore intervened between his appearance on Friday, September 28, and the day of his trial. About 10:30 Tuesday morning, October 2, 1956, he was brought into court. He was told that his case had been advanced a day on the docket and that his trial was about to begin. That was his notice of trial. Within fifteen minutes to half an hour the trial began. No witnesses were put on the stand however until 2:00 P.M.

MacKenna protested against being put to trial in advance of the date set for trial, because of inability to reach his witnesses. He asked his attorneys to move for a continuance. They told him that they had done so, in a conference with the judge, and that

his trial had to be held on October 2 because another case originally scheduled for October 2 had to be postponed. According to MacKenna, he told the trial judge that he had given the names and addresses of witnesses to his attorneys and that they had not summoned any witnesses. MacKenna himself then asked the court for a delay of at least one day, at least a continuance of twenty-four hours, and he would try to reach the witnesses by telephone. The court denied the request and instructed MacKenna to let his attorneys handle it. MacKenna asserts that his attorneys then made several telephone calls, but none of the witnesses were available on such short notice. His attorneys denied having made any telephone calls, except for one call to a character witness, in the afternoon, after MacKenna had taken the stand.

The record does not show that the attorneys formally applied for a continuance and in the hearing below they testified that no motion for a continuance was presented. However, Exception II filed in the state court proceedings reads:

> "Exception II
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> "Two court days after appointment of counsel, above, defendant was taken back to court on October 2, 1956, and advised his trial had been 'moved up' because of postponement of another trial, and that he was to be tried forthwith.
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> "*Defendant protested* he had not had time to contact the witnesses who wished to appear in his defense, and asked for a continuance. Defendant has never theretofore asked for a con-

tinuance in the cause. The defense counsel appointed by the Court advised defendant they had moved for continuance, but that the Court had overruled the motion.

"Then and there, in open Court defendant excepted."

It is clear that the application for a continuance failed to comply with the procedural requirements established in Article 543 of the Texas Code of Criminal Procedure.[3] It is clear that the bill of exception was defective. "The bill [of exceptions] must

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[3] Article 543, Texas Code of Criminal Procedure, reads: "Art. 543. [608] [597] First application by defendant—1 In the first application by the defendant for a continuance, it shall be necessary, if the same be on account of the absence of a witness, to state: '1. The name of the witness and his residence, if known, or that his residence is not known. '2. The diligence which has been used to procure his attendance; and it shall not be considered sufficient diligence to have caused to be issued, or to have applied for, a subpoena, in cases where the law authorized an attachment to issue. '3. The facts which are expected to be proved by the witness, and it must appear to the court that they are material. '4. That the witness is not absent by the procurement of consent of the defendent. '5. That the application is not made for delay. '6. That there is no reasonable expectation that attendance of the witness can be secured during the present term of court by a postponement of the trial to some future day of said term. The truth of the first, or any subsequent application, as well as the merit of the ground set forth therein and its sufficiency shall be addressed to the sound discretion of the court called to pass upon the same, and shall not be granted as a matter of right. If an application for continuance be overruled, and the defendant convicted, if it appear upon the trial that the evidence of the witness or witnesses named in the application was of a material character, and that the facts set forth in said applicatioin were probably true, a new trial should be granted, and the cause continued or postponed to a future day of the same term."

disclose further the reasons assigned and must set out the application." 4 Tex. Jur. App. and Error—Criminal, p. 365, Section 246 and cases cited.

MacKenna was the only witness to testify for the defense. He was found guilty and sentenced to eight years imprisonment. His attorneys bowed out, although they did offer to appeal, and MacKenna himself prepared a motion for a new trial, alleging that he had new evidence. MacKenna attached to his motion the affidavits of a number of witnesses who would have testified in his favor had they been given more notice and had the case been continued. His wife would have testified as to his whereabouts the afternoon and night of the alleged theft. June Chapman, his company's bookkeepepr, would have identified his time card showing that he was at work the day of the theft. Ward B. Chandler, editor of the company that employed MacKenna, would have testified that he was at work the day the theft is supposed to have occured. Dr. John F. Anderson, Jr., Pastor of the First Presbyterian Church of Dallas, Major Kenneth E. Moses, Volunteer Parole Supervisor for the County of Dallas, Salvation Army, and Mr. William Dalton, Parole Officer for the County of Dallas, would have testified as to MacKenna's character, home life, and adjustment in society. A new trial was denied; of course, none of MacKenna's "new evidence" was new evidence in a legal sense.

Acting for himself, MacKenna perfected an appeal to the Court of Criminal Appeals of Texas. That court affirmed the judgment of the trial court, April 3, 1957. *MacKenna v. State*, 1957, 301 S.W.2d 657.

The opinion of the court did not deal with Exception I. The court held, as to Exception II: "While Bill of Exception No. II certifies that on the day the case proceeded to trial appellant 'protested he had not had time to contact the witnesses who wished to appear in his defense and asked for a continuance', the bill is insufficient as the application for continuance is not shown therein." *MacKenna v. State*, 1957, Tex. Ct. Crim. App., 301 S.W.2d 657, 658. The result was inevitable under Texas law. *Pena v. State*. Tex. Cr. App., 1 S.W.2d 1095; *Williams v. State*, 115 Tex. Cr. R. 574, 27 S.W.2d 217 and *Chavez v. State*, 147 Tex. Cr. R. 423, 181 S.W.2d 85.

MacKenna then filed an application for a writ of habeas corpus in the trail court. On its denial, he filed a petition for a writ of certiorari with the United States Supreme Court. This too was denied, August 14, 1957, 355 U.S. 871, 78 S.Ct. 70, 2 L.Ed. 2d 55, reh. den. 355 U.S. 886, 78 S.Ct. 152, 2 L.Ed.2d 116.

On October 31, 1957, the Texas Court of Criminal Apppeals denied MacKenna's petition for writ of habeas corpus. The same court also denied a rehearing. Apppellant next filed for writ of habeas corpus in the United States District Court for the Southern District of Texas, Houston Division. In a memorandum and order rendered January 28, 1958, the district judge refused to grant the writ of habeas corpus, or to enter an order to show cause, or to issue a certificate of probable cause. MacKenna then perfected his appeal to this Court. January 16, 1959, we remanded the case to the district court. The

United States Supreme Court denied the appellee's petition for a writ of certiorari. *Ellis v. MacKenna*, 1959, 360 U.S. 935, 79 S.Ct. 1453, 3 L.Ed.2nd. 1547.

In our earlier MacKenna decision we held that the appellant was entitled to a hearing on the truth or falsity of his allegations (1) that he was forced, over his objections, to accept representation of counsel appointed by the court and (2) that he was given no reasonable opportunity to secure the presence and testimony of his witnesses.

August 6, 1959, the district court held a hearing on this case and denied MacKenna's appplication for a writ of habeas corpus. The case is now before us on appeal from that determination.

I.

On the question of the appointment of counsel for MacKenna, the trial judge held that the two lawyers "were not appointed over his objection". He found:

> "The evidence is that before these lawyers were appointed that MacKenna beckoned to them and they went over and talked to him in the courtroom in Dallas County, that later that same morning they were appointed to represent him. It is the testimony of the lawyers that he did not protest, that he made no objection to their appointment.
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> "The testimony of the lawyers is they did confer with him, they advised with him, and at least some of their advice he did not accept, which of course he was under no obligation to accept."

This finding is clearly erroneous in failing to give effect to the conclusiveness of a bill of exception in its recital of facts. Bill of Exception I sets out unequivocally that the trial judge appointed counsel "over protest" of MacKenna and that "then and there, in open court, the defendent took exception to the action".

A bill of exceptions is defined as follows: "A Bill of Exception is a written objection to the ruling of a court on a point of law, properly certified by the judge who made the ruling. It shows what occurred in the trial court, and perpetuates in the record the ruling of the court to which objection is made. It incorporates into the record matters that would otherwise not be part thereof, and presents to the appellate court a true recitation of the matters presented to the trial court and the rulings of that court." 4 Tex. Jur. 2d 23, App. & Error—Civil, Section 489. When a bill of exception is presented to a trial judge, he is required to approve it if it is correct. If he feels that it is not correct, he may make suggested corrections with the approval of the parties. If the parties fail to agree, the trial judge must draw another bill, and if the party who presented the original bill is still not satisfied, he may have his bill verified by bystanders. But the trial judge must certify the bill of exception if it states the facts as they actually occurred during the trial. See 5 Tex. Jur. 2d, App. and Error—Criminal, Sections 175-178.

Numerous Texas decisions hold that a certificate of approval by the trial judge of a bill of exception

conclusively establishes that the facts as recited in the bill actually occurred. Courts are not at liberty to look beyond the bill to determine the correctness of the recitals. *Howard v. State*, Tex. Cr. App., 178 S.W. 506; 5 Tex. Jur. 2d 518, App. and Error—Section 319. The rationale for the rule is stated in *Banks v. State*, 254 S.W. 962 (Tex. Crim. App. 1923):

> "Great care should be exercised by trial judges in the examination of bills of exception, to see that they reflect proceedings as they occurred. The general rule adhered to by this court is that we accept the statements in bills of exception in preference to those appearing in the statment of facts, upon the hypothesis that the attention of the trial court had been specifically directed to the facts contained in such bills of exception, and that they have the appproval of the court below after critical examination."

See *Ticer v. State*, 313 S.W. 2d 301 (Tex. Crim. App. 1958) (established fact that motion for mistrial was made);[4] *McCollum v. State*, 233 S.W.2d 493 (Tex. Crim. App. 1950) (certificate of ap-

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[4] In Ticer, v. State, 313 S.W.2d 301 (Tex.Crim.App. 1958), a certified bill of exception recited that a motion for mistrial was made and overruled. The issue was whether the certification was binding. The court held that the trial judge's certificate of approval established that such a motion was made and that it was binding: "In the case at bar, the bill of exception recites that a motion for mistrial was made and was by the trial court overruled. When the trial court approved this bill of exception, *he certified that just that and nothing more had occurred.* He did not certify that the allegations in the motion were correct or that the events set forth therein had in fact occurred." (emphasis added)

proval established fact that motion for instructed verdict was made); *Gonzales v. State*, 18 S.W.2d 618 (Tex. Crim. App. 1929); *Barnett v. State*, 17 S.W.2d 831 (Tex. Crim. App. 1929); *Benavides v. State*, 14 S.W.2d 67 (Tex. Crim. App. 1929) (established fact that request for special charge was made); *Sims v. State*, 13 S.W.2d 98 (Tex. Crim. App. 1929);[5] *Knox v. State*, 13 S.W.2d 378 (Tex. Crim. App. 1929);[6] *Estell v. State*, 300 S.W. 913 (Tex. Crim. App. 1922) (established motion for postponement). See *Rousey v. State*, 7 S.W.2d 557 (Tex. Crim. App. 1928); *Elkins v. State*, 276 S.W. 291 (Tex. Crim. App. 1923). See 5 Tex. Jur. 2d, Section 319, p. 518.

It is significant that the certification of the Criminal District Court, attached to the bills of exception, states that MacKenna's bills of exception were "examined by [the Court] *and having been submitted to counsel for the state*, the same are found to be correct and are hereby allowed, signed and ordered filed as part of the record".

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[5] In Sims v. State, 13 S.W.2d 98 (Tex. Crim. App. (1928), the court said: "Appellant insists, on motion for rehearing, that we erred in holding that it was not necessary under the facts of the instant case for the state to elect upon which of two proven transactions it asked for a conviction. There is some conflict between the bill of exception presenting the matter and the statement of facts. We are bound, however, in such case, by the bill of exception approved by the judge."

[6] In Knox v. State, 13 S.W.2d 378 (Tex. Crim. App. 1929), the court said: "It is difficult for this court to believe that these bills speak the facts, but we are compelled to accept them as so doing, since in plain words the trial judge has approved as true the facts set out in each of said bills."

Since under Texas law there can be no question as to MacKenna in fact having pprotested the appointment of counsel, the first question boils down to whether, in the unusual circumstances of this case, the trial judge offended due process in appointing counsel, over the protest of the accused.[7]

We interpret the right to counsel as the right to effective counsel. We interpret counsel to mean not errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likey to render *and rendering* reasonably effective assistance. We consider undivided loyalty of appointed counsel to client as essential to due process.

We do not doubt the propriety of a trial judge appointing an attorney for the defense over the protest of the accused when the accused lacks the intelligence or the education to handle his own defense. Here, however, as we said in the earlier opinion:

> "The defendant, being sui juris and mentally competent, had a right to rely on his own skill and ability and to conduct his defense in person without the assistance of counsel; and the court was not justified in imposing assigned counsel on the defendant against his will. Clearly, we think, it would be a denial of due process of law for the court to refuse to permit the accused, sui juris and mentally competent, to

[7] At the trial below MacKenna's attorney seemed to think that the only issue was whether the refusal to grant a continuance was a deprivation of due process. The question of the appointment of effective counsel, however, was briefed and argued by both parties.

> defend himself and, instead, require him to accept the services of inexperienced and incompetent counsel, as is alleged in the petition for habeas corpus. The appellant is entitled to a hearing to ascertain the truth or falsity of such allegations." *MacKenna v. Ellis, 5 Cir., 1959,* 263 F.2d 35, 40.

The record of the hearing below reinforces the view expressed in the earlier opinion. One of the appointed lawyers had received his license to practice law just three weeks before he was appointed counsel for the accused. The other appointed lawyer had been practicing five months. They had had one case. In that case their client pleaded guilty to a narcotic charge.

At the very time of their appointment as MacKenna's counsel each of the young lawyers had on file with the Dallas County District Attorney's Office a request for employment. Several months later both were employed by the Dallas District Attorney. At the time of the hearing below one was still in the employ of the District Attorney's Office. The other, now an office attorney for an insurance company, testified that in October, 1956, he and his co-counsel "were sort of practicing on our own when we were waiting for an opening in the District Attorney's Office". We feel certain that these young men were well intentioned. But their inexperience and the conflict of interest created by their filing an application for employment in the District Attorney's Office prevented their defending MacKenna with the vigor and the undivided dedication to their client's cause

to which any accused person is entitled. "The right to assistance by counsel means effective assistance by an attorney who gives the accused his complete loyalty and whose service is of such character as to preserve the essential integrity of the proceedings." In re York, Okla. Cr. 1955, 283 P.2d 567, cert. den., *York v. McLeod*, 1955, 350 U.S. 839, 76 S.Ct. 77, 100 L.Ed. 748.

In view of their relationship with the District Attorney, it is not surprising that they were willing to accommodate him by agreeing to the short notice of trial and to the advance in the trial date without notice. In the hearing below, the attorneys were questioned as to whether they recalled the reason for the case being moved up to October 2. One answered: "Not definitely, no. It was just—the State's Attorneys, Mr. Montgomery and Judge McCormack wanted the case tried on that date." The other answered: "As best I recall they had another case they wanted to try and we didn't see any reason in having it postponed since we hadn't planned on producing any character witnesses and there were no fact witnesses available to us."

The young men appointed as counsel were licensed lawyers and graduates of good law schools. No doubt, today, they are excellent lawyers. Their lack of vigor in conducting MacKenna's defense and their mistakes did not show up, of course, until *after* their appointment. But a trial judge who appoints fledgeling attorneys as defense counsel, over the defendant's protest, cannot wash his hands of their mis-

takes.' Fundamental fairness to a person accused of crime requires such judicial guidance of the conduct of a trial that when it becomes apparent appointed counsel are not protecting the accused the trial judge should move in and protect him.

Here, in the first place, the appointed counsel made no objection to the short notice of trial. Then they made no objection to the trial being pushed up from Wednesday to Tuesday. They admitted asking for a continuance in a private conference with the trial judge, but did not file a formal motion for a continuance. The bill of exception shows that MacKenna himself, with his lawyers present in court, asked for a continuance. The bill also shows that his layman's request for a continuance plainly does not comply with the requirements of the Texas Code of Criminal Procedure. The bill was defective in fail-

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Hawk v. Hann, D.C. Cir. Neb., 1952, 103 F.Supp. 138; U.S. ex rel. Foley v. Ragen, D.C. Cir. Ill, 1943, 52 F.Supp. 265; U.S. ex rel. Hall v. Ragen, D.C. Cir. Ill, 1945, 60 F.Supp. 820. See also Sanchez v. State, 1927, 199 Ind. 235, 157 N.E. 1; State v. Keller, 1929, 57 N.D. 643, 223 N.W. 698. See generally Note, "Incompetent Counsel as Ground for New Trial in Criminal Cases," 47 Co. L. Rev. 115 (1947); Comment. "Incompetency of Counsel as a Ground for Attacking Criminal Convictions," 4 U.C.L.A.L. Rev. 400 (1957). As to other aspects of "effective" assistance, see Glasser v. United States, 1942, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed 680 (defendant's counsel representing other defendants with conflicting interests); Avery v. Alabama, 1940, 308 U.S. 444, 60 S.Ct. 321, 84 L.Ed. 377 (failure to grant continuance to prepare defense). Michel v. Louisiana, 1955, 350 U.S. 91, 76 S.Ct. 158, 100 L.Ed. 83, denying relief to petitioner, clearly carries the implication that in the proper case, depending on the circumstances, appointed counsel may be so ineffective as to render a trial lacking in due process.

ing to set forth the reasons assigned and the application for a continuance. MacKenna's defense turned on an alibi, yet the obvious witnesses to prove the alibi were not in court and had not been interviewed by appointed counsel. The attorneys offered to appeal and apparently examined MacKenna's motion for a new trial, with its exhibits, but did not render assistance in the preparation of the motion for a new trial or the appeal.

As we see it, an essential element of the fair trial of a defendent with court-appointed counsel is trial court sensitivity to protecting the defendant against hasty trials and against obvious mistakes of young, inexperienced, appointed counsel. A genuflection in the direction of justice by the pro forma appointment of counsel such as MacKenna had is something less than adequate judicial guidance and the furnishing of effective counsel to an accused. In *Johnson v. United States*, D.C. Cir., 1940 110 F.2d 562, the court said:

> "The government says that, even if this be conceded, Thomas' testimony was, in the exercise of due diligence, available to the defense at the trial and therefore ought not to be considered after conviction. We think this does not follow. The experienced counselor who represents appellant here did not represent him at the trial. Accused was a colored boy without funds or other means to employ counsel of his own selection, and the court appointed two attorneys to defend him. The defense was conducted by one of them and another member of

the bar. These attorneys did not examine the transcript of the testimony taken at the inquest. After the trial, they filed no brief in this court within the time allowed by the rules. The trial court finally asked present counsel to represent the defendant on this appeal. *In the circumstances the failure of counsel to produce all available evidence, in a case involving the life of the accused, should not be held against him. It would be a strange system of law which first assigned inexperienced or negligent counsel in a capital case and then made counsel's neglect a ground for refusing a new trial.*" (Emphasis added.)

In *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932), Mr. Justice Sutherland said:

"It is not enought to assume that counsel thus precipitated into the case thought there was no defense, and exercised their best judgment in proceeding to trial without preparation. Neither they nor the Court could say what a prompt and thorough-going investigation might disclose as to the facts. No attempt was made to investigate. No opportunity to do so was given. Defendants were immediately hurried to trial. Chief Justice Anderson, after disclaiming any intention to criticize harshly counsel who attempted to represent defendants at the trials, said: ' . . . The record indicates that the appearance was pro forma rather than zealous and active . . .' Under the circumstances disclosed, we hold that defendants were not accorded the right to counsel in any substantial sense. To decide otherwise, would be to ignore actualities . . ."

II.

In the hearing below the district court held that MacKenna was given a reasonable opportunity to secure the presence and testimony of witnesses. In reaching this result the district court relied on the testimony of MacKenna's counsel: "Each testified that there was no motion for continuance"; MacKenna did not discuss with them, did not reveal to them the names of any alibi witness . . . only the name of Dr. Anderson and some members of Alcoholics Anonymous". Again this finding is clearly erroneous in failing to give effect to the recital of fact in the bills of exception submitted to counsel for the state and certified as correct by the Criminal District Court.

There is no doubt that under Texas law the motion was defective for failure to comply with Article 543. There is equally no doubt that, as the trial court certified in Exception II, after submission of the exceptions to counsel for the state, defendant "asked for a continuance" and "protested he had not had time to contact the witnesses who wished to appear in his defense". Exception II states also that the defense counsel "moved for continuance, but that the court had overruled the motion".

According to MacKenna, he gave his attorneys the names and addresses of his witnesses on Friday, September 28. According to his attorneys, he had no fact witnesses, only character witnesses, and because of MacKenna's criminal record it was their considered opinion, with which MacKenna agreed, that

he should not take the stand and not put his character at issue; his decision to take the stand brought about his conviction and long sentence. One of the attorneys admitted, however, "I wouldn't swear they weren't given to us, no." The depositions and affidavits show that telephone calls to fact witnesses on the day of the trial support MacKenna's statement that he had alibi witnesses who could not be reached in time to testify. Some of these calls, according to the depositions, came in the morning—before MacKenna took the stand.

The deposition of Mrs. June Chapman, Bookkeeper for Newman-Miller Printing Company, where MacKenna was employed, states that someone—presumably MacKenna or one of his attorneys—did try to reach her by telephone shortly before noon on the day of the trial. She was a fact witness. She kept time-cards on the company's employees. According to her deposition she would have testified that MacKenna was at work until 4:30 P.M. the day of the theft of the camera and that his wife came by the plant, as was her invariable custom, to pick him up after work. A photostatic copy of MacKenna's time-card for October 18, 1955 is in the record. Mrs. Chapman swore, as did MacKenna's wife, that if she had been given reasonable notice she would have testified in his defense.

MacKenna is now divorced. His ex-wife's deposition states that she received a telephone call on the day of MacKenna's trial, urging her to go at once to the Dallas County Courthouse. She stated that the call came in at 1:30 P.M., but that "she was

cooking lunch and could not eat, bathe, dress, and get down to court by 2:00 P.M., which was the time the defense counsel said it was necessary for me to be there". She too was a fact witness. She would have testified that her husband did not go to the State Fair Grounds on October 18, 1955, the day the camera was stolen.

Ward Chandler, Editor and Publisher of Chandler Publications, is associated with the company for which MacKenna worked. His deposition states that he was telephoned the morning of the trial by someone he thought was one of MacKenna's defense counsel but whose name he does not remember. He was asked to testify but, because of press of business, could not do so. Mrs. Chandler worked with her husband. Her deposition states that a telephone call came in from someone representing himself to be MacKenna's defense counsel. Mrs. Chandler deposed: "My husband took the call, and when he got through, he said: 'That's a fine way, to call someone the morning of the trial and you can't even get there.' ".

MacKenna contends that before trial the total discussion of the case between himself and his appointed counsel amounted to only fifteen minutes. His counsel say that they spent thirty to forty-five minutes with him. They concluded that MacKenna's witnesses were all character witnesses. If so, the presence of character witnesses was essential to the defense—once MacKenna took the stand. In fact, one of the attorneys testified that he attempted to call Dr. Anderson "to attempt to reconstruct [Mac-

Kenna's] character". Had there been reasonable notice of trial or a continuance, character witnesses could have testified. But whether the witnesses were fact witnesses or character witnesses, to force an accused person to trial at a time when he cannot obtain any witnesses at all falls short of our notion of a fair trial.

In *Paoni v. United States*, 281 Fed. 801 (3 Cir. 1922), two defendants and others were convicted for narcotics violations. One June 16, notice was mailed to the defendants' counsel that their case was set for June 22—more notice than Mac[illegible]na received [illegible] defendants appeared in [illegible] morning [illegible]rial, but their attorne[illegible]e an [illegible]in court until [illegible]hey [illegible]ontinue[illegible]y [illegible]d [illegible]d

and when service of subpoenas and the appearance of witnesses is impossible." (Emphasis added.)

Although Paoni involved the Sixth Amendment and the case was on review by a writ of error, the principle that controlled in Paoni applies with equal force in a habeas corpus proceeding involving the due process clause of the Fourteenth Amendment: the opportunity of an accused to meet the prosecution's case with the aid of witnesses is historically and in practice fundamental to a fair trial. *Powell v. Alabama*, 1932 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158.

Paoni and the instant case are distinguishable from *Mitchell v. United States*, 1958, D. C. Cir. 258 F.2d 435, in which a majority of the court held that the petitioner was not entitled to a hearing under 28 USCA Section 2255 on the representation that court-appointed counsel was incompetent. In that case Judge Prettyman, for the majority, emphasized that the decision was *not* one involving "dual interest, insufficient time for preparation, or inadequate notice". *Avery v. Alabama*, 1941, 308 U.S. 444, 60 S.Ct. 321, 84 L.Ed. 377 is distinguishable, because of the attorney's zeal in conducting the defense, the opportunity provided by "Court Week" for the attorneys to investigate, and other "facts and circumstances" peculiar to that case.

Article 543 of the Texas Code of Criminal Procedure sets forth very clearly the requirements for a continuance. We do not question the propriety, the

reasonableness, the constitutionality of Article 543. We do not reach that question. "Such detailed and technical requirements of a motion for continuance, no doubt, serve a salutary purpose in a proper case, but they cannot justify putting a defendant to trial when he has no fair opportunity to secure the attendance of his witnesses." *MacKenna v. Ellis*, 1959, 5 Cir., 63 F.2d 35, 40.

The Texas Court of Criminal Appeals did not reach the merits of the question whether a continuance should or should not have been denied. And the denial of the continuance has bearing here only in a "but for" sense: but for the refusal of the continuance, MacKenna might have had a fair trial. The question is whether MacKenna had any trial. There is no trial without due process.

Disregarding what might have happened, and considering only what actually did happen, we find a combination of circumstances that unfairly prevented the accused from meeting the prosecution's case. The combination of circumstances we refer to are these: (1) the short notice of the trial set for October 3—the defendant hauled into court on a Friday after six months imprisonment and notified that his trial would take place the following Wednesday; (2) the advance in the trial date from Wednesday to Tuesday, without notice, forcing defendant to trial at a time when he could not obtain any witnesses; (3) the appointment of inexperienced counsel, over the protest of the defendant; (4) the equivocal relationship of these young attorneys to the District Attorney, making it difficult, if not impossible, for

them to oppose the District Attorney's request that the case be moved up; (5) the lack of effective assistance of counsel—in failing to interrogate witnesses, in failing to take steps to have witnesses present at the trial, in failing to apply properly for a continuance, in bowing out with precipitate haste, and, generally, in conducting what can be described only as a half-hearted defense of the accused; (6) the trial court's insensitivity to the need for protecting the defendant from a hasty trial without notice and from the obvious errors of inexperienced appointed counsel.

III.

This Court is well aware of the abuse of federal habeas corpus by state prisoners.[9] The Court has an "alert deference"[10] to the judgments of state courts and scrupulously avoids unwarranted federal intrusions into state procedures.[11] We are conscious of the caution implicit in Mr. Justice Burton's comment:

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[9] See Goodman, Use and Abuse of the Writ of Habeas Corpus, 7 FRD 313 (1948); Parker, Limiting the Abuse of Habeas Corpus 8 FRD 171 (1949); Pollak, Proposals to Curtail Federal Habeas Corpus for State Prisoners, 66 Yale L. Jour. 50 (1956); Report of the Conference of Chief Justices at Pasadena, California, August 1958.

[10] Mr. Justice Frankfurter's phrase, in Malinski v. New York, 1945, 324 U.S. 401, 65 S.Ct. 781, 89 L.Ed. 1029.

[11] See, for example, the recent cases decided by members of this panel: Larson v. United States, 5 Cir., 1960, 275 F.2d 673; T. Smith & Son, Inc. v. Williams, 5 Cir., 1960, 275 F.2d 397; Empire Picture Co. et al. v. City of Fort Worth, et al., 5 Cir., 1960, 273 F.2d 529; Williams v. Moore, 5 Cir., 1959, 262 F.2d 335, cert. denied, 360 U.S. 911, 79 S.Ct. 1297, 3 L.Ed. 2d 1261.

"There is nothing in the Fourteenth Amendment specifically stating that the long recognized and then existing power of the states over the procedures of their own courts in criminal cases was to be prohibited or even limited."[12] We deplore the vagueness, the uncertainty, the necessity of reliance on individual notions—inherent in applying as a standard of due process a concept such as "fairness" or "fundamental fairness essential to the very concept of justice" or "a sense of justice" or, perhaps, in Cahn's phrase, a "sense of injustice".[13] But MacKenna's request for habeas corpus is properly before us. On the record as we read it, MacKenna did not have his day in court to meet the prosecution's case. A fair chance for an accused person to say his say is so rooted in the traditions and conscience of our people as to be "of the very essence of a scheme of ordered liberty".[14]

For the theft of a camera valued at $250, MacKenna has served a substantial part of his eight-year sentence, and has been confined for more than four years. The Court's duty upon a habeas corpus hearing is to "dispose of the matter as law and justice require." 28 U.S.C.A. Section 2243; compare 28 U.S.C.A. Section 2106. It is our opinion that MacKenna's discharge will best serve the ends of justice. *Aderhold v. O'Neill*, 5 Cir., 1933, 66 F.2d 85; *Reid v. Sanford*, N.D. Ga., 1941, 42 F.Supp. 300, 303, 304; 39 C.J.S. Habeas Corpus, Section 102, p. 690,

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[12] Bute v. Illinois, 1948, 333 U.S. 640.

[13] Cahn, Sense of Injustice. (New York U. Pr. 1949).

[14] Cardozo. Palko v. Connecticut, 1937, 302 U.S. 319, 82 L.Ed. 288, at 292.

n. 92. The judgment is therefore reversed and the cause remanded with directions to grant the writ and discharge the petitioner. See 28 U.S.C.A. Section 2106.

Reversed and Remanded with directions.

CAMERON, Circuit Judge, Dissenting:

In seeking to formulate a dissent to the exhaustive opinion filed by the majority, I think it appropriate to quote from a Supreme Court opinion an epitome of the spirit in which a federal judge should approach the consideration of a case which may result in setting aside a State court decision in a criminal case:

> ". . . in reviewing a State criminal conviction under a claim of right guaranteed by the Due Process Clause of the Fourteenth Amendment, from which is derived the most far-reaching and most frequent federal basis of challenging State criminal justice, 'we must be deeply mindful of the responsibilities of the States for the enforcement of criminal laws, and exercise with due humility our merely negative function in subjecting convictions from state courts to the very narrow scrutiny which the Due Process Clause of the Fourteenth Amendment authorizes.' Malinski v. New York, 324 U.S. 401, 412, 418. Due process of law, 'itself a historical product,' Jackman v. Rosenbaum Co., 360 U.S. 22, 31, is not to be turned into a destructive dogma against the States in the ad-

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ministration of their systems of criminal justice." *Rochin v. California*, 1951, 342 U.S. 165, 168.

And in *Darr v. Burford*, 1950, 339 U.S. 200, 218, this general test was laid down:

> ". . . A conviction after public trial in a state court by verdict or plea of guilty places the burden on the accused to allege and prove primary facts, not inferences, that show, notwithstanding the strong presumption of constitutional regularity in state judicial proceedings, that in his prosecution the state so departed from constitutional requirements as to justify a federal court's intervention to protect the rights of the accused."

The majority here looses the long insensate arm of the federal government and empowers it to filch from the hands of the official of a sovereign State the key to the jail house and set free one who was duly and legally convicted of violating the laws, not of the nation, but of the State of Texas. This extreme action, as I see it, is not justified by the facts before the Court, or by any authority cited. Two cases by federal courts are relied upon by the majority. The first in *Aderhold, Warden v. O'Neill*, 1933, 66 F.2d 85. O'Neil was a federal prisoner and this Court held that he had served all but seventy-four days of a *void* fourteen months sentence.[1]

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[1] As authority for the discharge we cited only the case of In re Bonner, 151 U.S. 242. The discharge in that case was from the wrong penitentiary so that the prisoner might be turned over to the custodian of the proper penitentiary.

The other federal case is *Reid v. Sanford, Warden*, U.S. D.C. N.D. Ga., 1941, 42 F. Supp. 300, in which Judge Underwood ordered a federal prisoner discharged where he found that the conviction was of doubtful validity and that he had "already served about all that would be required on a valid thirty year sentence."

With such scant supporting authority, the action ordered by the majority here, in my opinion, sets a dangerous precedent, and the reasoning by which its conclusion is reached deserves to be carefully tested.

I.

When this case was before this Court before Judge [then Chief] Hutcheson wrote a very able dissent[2] with which I am in full agreement. Both of the points now developed in great detail were answered in that dissent. For convenience, I quote a portion of the dissent found on page 46:

> "The second point, made by the majority, is no better taken. This is that the denial of his motion for continuance because of its failure to comply with the provisions of Art. 543 of the Texas Code of Criminal Procedure was a denial of due process. Here the majority, without pointing to any authority supporting the view, seems to think and say that the fourteenth amendment prevents or circumscribes the right of the Legislature of Texas to prescribe and of Texas Courts to follow the prescribed procedure in criminal cases, and that

[2] MacKenna v. Ellis, 1959, 263 F.2d beginning on page 44.

it may be held that defendant has been deprived of due process when state procedure with regard to the requirements for motion for continuance does not conform to what the majority thinks due process requires.

"Again, with deference but with complete conviction, I assert the law absolutely settled otherwise, . . .

"One of the prime provisions of the Texas statute is that when a continuance is sought for absence of witnesses, the facts which are expected to be proved by the witnesses must be shown 'and it must appear to the court that they are material.' . . .

"Under the facts of this case, to send it back to the district judge to try the issues presented is, I think, a complete rejection of the basic principle that a state, in matters in its own sphere, is sovereign, and that it is not subject to the supervision and control of federal courts."

The majority in the present opinion concedes that the provisions of Art. 543 were not complied with and that those provisions are valid and enforceable. But it does not, in my judgment, follow what it concedes.

II.

The chief discussion by the majority opinion of both of the points sent back by the former decision for trial has as its major thesis that appellant did not want to be represented by attorneys and so told the court, that the court forced attorneys upon him[3]

[3] We approved such a practice in Gray v. Ellis, 1958, 257 F.2d 159.

and provided him with attorneys who were inexperienced, incompetent, and who were so beholden to the prosecuting attorneys for the State of Texas that they did not, because they could not, properly look after the interests of the man they were appointed to defend. This major premise is not, in my opinion, sustained by the record.

(a) To begin with, this whole contention was abandoned by the attorney who represented MacKenna before the court below.[4] After all of the testimony was in and the question of arguments was being discussed, the following colloquy took place:

> THE COURT: "In obedience to the opinion of the Court of Appeals rendered January 16, 1959 that I would conduct a hearing, which has been done, to resolve two questions— . . .
>
> "The Court of Appeals says, 'The remaining two grounds which have more substance are: (3) That the trial court forces [sic] the appellant, over his objections, to accept representation of counsel appointed by the Court.'

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[4] Appellant was represented in that hearing by Bernard A. Golding, Esquire, of the Houston, Texas bar. Examination of Martindale-Hubbell Law Directory shows that he was admitted to the bar of Texas in 1957. The fact that he was and is an experienced and successful practitioner is attested by the many important cases which have been argued before this Court and the Supreme Court of the United States, e.g., Indiviglio, et al v. United States, 5 Cir., 1957, 249 F.2d 549, 551, reversed by the Supreme Court, 1958, 357 U.S. 574.

"I understand that the petitioner is abandoning that one."

MR. GOLDING: "I think so, Judge. I frankly and candidly don't think that the review of the decision in my mind doesn't place as much emphasis—"

Near the end of the colloquy the same idea was repeated:

MR. GOLDING: "I frankly admit to the Court, and that is only one issue in this case and that is whether or not—"

THE COURT: "Whether he had ample opportunity to have his witnesses present."

MR. GOLDING: "Whether or not the refusal to grant the continuance, if such was made, constituted a deprivation of due process."

The majority ignores this narrowing of the issues altogether. But I think it is of great importance and that this experience and capable attorney, having examined the appellant and subjected his two court-appointed attorneys to a vigorous cross-examination, was convinced that this point was without merit and that the question of the continuance was the only issue remaining in the case.

(b) The court below found the facts under the point squarely against the appellant. The judge was a Texan, familiar with Texas lawyers, Texas practice and Texas judges and, having observed the witnesses as they testified before him in open

court, made specific findings, as set out in the margin.[5]

Without question, MacKenna acquiesced in the appointment of the lawyers, giving them, according to his testimony, the names of witnesses, discussing with them whether he should take the stand, and generally consulting with them at least as his advisors—see *Gray v. Ellis, supra*. The point is, in my opinion, wholly without merit.

III.

The other question presented, which the experienced counsel representing MacKenna in the lower court thought was the only question involved, was whether appellant's rights under the Fourteenth Amendment were violated by the Texas trial judge (apparently deceased when the case was heard by the court below) in his ruling on the so-called motion for continuance. The majority holds that appellant's constitutional rights were violated chiefly on the ground that one of the numerous bills of exceptions prepared by MacKenna recited that a motion for

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[5] "The evidence is that before these lawyers were appointed that MacKenna beckoned to them and they went over and talked to him in the courtrooms in Dallas County, that later the same morning they were appointed to represent him. It is the testimony of the lawyers that he did not protest, that he made no objection to their appointment. The testimony of the lawyers is that they did confer with him, they advised with him, and at least some of their advice he did not accept, which of course he was under no obligation to accept. I would resolve that issue and find that the two lawyers in question, Collier and Tucker, were not appointed over his objection."

continuance was made and denied. I do not understand that the majority feels that the recital of this bill of exceptions is final and conclusive, because the opinion frankly admits that the motion mentioned in the bill of exceptions did not comply with valid Texas procedural statutes. The majority further concedes that the court below found the facts on this point against appellant.

It is important to recall that the experienced trial attorney representing MacKenna in the court below manifestly did not consider the recitals of the bill of exceptions final or important. He placed MacKenna on the stand and promptly had him testify to the details of what transpired in the handling of what he called a motion for continuance.

According to MacKenna's testimony, Messrs. Collier and Tucker had been appointed to represent him on Friday, September 28th. The three had a conference and he gave the attorneys a list of witnesses. On the morning of the date set for the trial, October 2, 1956, MacKenna stated to the judge that his lawyers had not yet obtained his witnesses and "I asked him for a continuance . . . I asked him to give me at least one day, at least twenty-four hours and I could probably get the witnesses by telephone . . . He told me to let my attorneys handle it."

The appointed lawyers testified that they also mentioned passing the case to the judge, although it was their understanding that the witnesses whose names were given them by MacKenna were character witnesses; and that it was their judgment,

expressed to MacKenna, that it would be unwise to place any such witnesses on the stand since the fact of the seven former convictions of appellant would be brought before the jury.

At all events, it is conceded that no motion for a continuance as required by Texas law was ever made, and the action of the Texas trial judge upon which appellant predicates his claim of denial of constitutional rights is the judge's failure to grant the motion for continuance which he, himself, had made orally. It is plain, therefore, that there was no denial of constitutional rights under appellant's own testimony. The court heard all of the testimony of MacKenna and of the lawyers and found that MacKenna had not made out the case stated in his petition.[6]

It is further clear that the witnesses brought forward in appellant's motion in the court below for a

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[6] "What the petitioner is asking for here is for me to set aside the ruling and judgment of the state court, which was appealed and affirmed. It is my opinion that judgment of the state court should not be set aside lightly. It should only be done for serious reasons, based upon serious grounds, grounds well established. I do not think that such proof has been made in this case. For the petitioner we have testifying the petitioner only. For the state we have two young lawyers of the state bar. . . .

"In this case the witness, MacKenna, has a considerable interest. I cannot say myself that the strong claims that he makes at this time were existent at the time of the trial, the time of which he is complaining. The two attorneys who testified—and let it be noted that the rule was invoked, that they were both excused from the courtroom and neither heard the testimony of the other—each testified that there was no motion for continuance. . . ."

rehearing of the petition for habeas corpus would not have given testimony which would have changed the result. The appellant testified categorically that he was in fact at the fair grounds and that he there obtained the camera in question from a man he had come to know in the prison. The date was never made certain, but he fixed it somewhere between October 13th and October 18th, 1955. The main complaint of appellant is that the witnesses whom the two lawyers failed to have present would have testified that he had not been at the fair grounds at or about that time.[7]

Surely the majority opinion fails to demonstrate the likelihood that any attorney would have made any effort to get character witnesses until after MacKenna had, over the attorney's objection, taken

[7] Probably the most important witness under appellant's contention was his former wife whose deposition was taken and who made the following statement:

"Interrogatory No. 11. From your personal knowledge of the charge against Edward Morgan MacKenna, you could and would have offered testimony in his behalf, showing his whereabouts and other facts, concerning the date of the alleged theft, October 18, 1955?

"Answer to Interrogatory No. 11: I do not recall his whereabouts on that day.

"Interrogatory No. 12. Testimony showing that during October, 1955, on every afternoon about 4:30 P.M., you drove to 2218 North Harwood Street, Dallas, his place of employment, picked up MacKenna, drove him home and spent the evening with him?

"Answer to Interrogatory No. 12: I did not.

"Interrogatory No. 13. And, to your best recollection and memory, this specifically included the afternoon and evening of October 18, 1955?

"Answer to Interrogatory No. 13. I do not recall."

the stand as a witness. One of the attorneys so testified.

Boiled down, therefore, these conclusions from the testimony are patent: (1) no motion for a delay or continuance was made in writing or in conformity with Texas law, the motion mentioned in the bills of exception obviously being that mentioned in (2) *infra;* (2) the oral motion which MacKenna made, evidently in the absence of his counsel, was not denied, but the court merely suggested that the matter be handled by the attorneys; (3) the alibi witnesses whose statements were produced on motion for rehearing would not have helped appellant, because he admitted that he did get the camera at the fair grounds and because he was unable to fix any dates, and the witnesses whose statements were proffered were unable to recall any specific dates; (4) no adequate showing is reflected in the record that any person would have testified to his good character, and it is further manifest that, if they had attempted to do so, they would have been met with questions concerning his seven prior convictions of crime.

Under these circumstances we cannot, in my opinion, justify a holding that the findings of the court below were clearly erroneous, and certainly are not justified in holding that the handling of the so-called motion for continuance amounted to denial of due process of law.

Under well settled principles of law, the question of a continuance, even if legally raised, would have

been one addressed to the discretion of the trial court: "That the action of the trial court upon an application for a continuance is purely a matter of discretion, and not subject to review by this Court, unless it be clearly shown that such discretion has been abused, is settled by too many authorities to be now open to question [citing five Supreme Court cases]." *Isaacs v. United States*, 1895, 159 U.S. 487, 489. And see also *Hardy v. United States*, 1902, 186 U.S. 224; and *Avery v. Alabama*, 1940, 308 U.S. 444, 446.

IV.

Reference in the majority opinion to the report of the Conference of Chief Justices at Pasadena, California, August, 1958, and to the other articles listed in Note 9 of the majority opinion indicates that it shares with me the feeling that the handling of habeas corpus by federal courts has been a prime factor in reducing to a low point the esteem in which they are held. Hardly a newspaper can be picked up which does not carry headlines about some revolting crime having been committed by an ex-convict. That group, it seems to me, is copiously replenished by the unwarranted intervention of federal courts into the police power of the States.

This case, it seems to me, furnishes a typical example. The opinion reflects upon the integrity and competence of Texas judges and law enforcement officers; upon the honesty and professional ability of two young lawyers who were commissioned by the court to represent this unfortunate appellant; upon

the capacity of the court below to weigh evidence given before him in person and to find the facts as that evidence reflects them. And what is it which the majority finds so convincing as to impel it to so extreme a holding? Essentially, the monstrous tale of a highly educated man seven times convicted of violating society's laws. It is not hard to understand the natural feeling of sympathy such an unfortunate individual arouses. But we, as judges, are not permitted the luxury of allowing our judgment to be swayed by excess of sentimentality. Ours is the duty always to hold the balance true between the unconstitutional rights of the individual and the protection to which society is entitled.[8]

[8] An illustration of the extent to which people generally are aroused by the feeling that the courts are not maintaining that balance, but are coddling criminals and neglecting society's vital interests may be found in the remarks of Senator Byrd of Virginia appearing in the Congressional Record of April 25, 1960 at page 8023:

"Mr. President, the chief justices of State supreme courts, in their conference held in Pasadena, Calif., in August, 1958, found that the . . . Supreme Court 'does not seem to have given any consideration whatsoever to the risks to society which might result from the release of a prisoner of this type.'

"The State chief justices were referring specifically to the case of *Moore v. Michigan* (335 U.S. 155). But for all intents and purposes, the statement is equally applicable to the Andrew Mallory case which the . . . Court decided on June 24, 1957.

"In this Mallory case the . . . Court seized upon what it chose to regard as a technical flaw in traditionally accepted police practice to turn loose a confessed and convicted rapist to prey again on innocent women.

"Andrew Mallory was arrested again in January 1958, little more than 6 months after he was freed, on charges of housebreaking and assault on the daughter of a woman who had befriended him.

Being convinced that the facts of this case do not justify the action ordered by the majority, and that precious Federal-State relationships are injured by the failure of Federal Judges to exercise restraint in such matters, I respectfully dissent.

"He was convicted on the assault charge April 4, 1958. Now he is indicted again in Philadelphia for rape and burglary.

"Certainly, the courts of this Nation must protect the rights and liberties of all of the people—but this means protection of innocent people, too. Here we have another example of the pattern of . . . Supreme Court decisions which has undermined the confidence of the American people in the Federal judiciary.

"The effect of the . . . Supreme Court decision in the original Andrew Mallory case was to hold that the police—not the rapist—had violated the law."

Another quotation from the extension of remarks of Senator Byrd appears at page A3746 of the issue of the Congressional Record—Appendix, May 3, 1960:

"'Some of us believe that enough has been done for those who murder and rape and rob,' said Senator Ervin, 'and that it is time to do something for those who do not wish to be murdered or raped, or robbed.'"

Appendix "D"

JUDGMENT

Extract from the Minutes of June 22, 1960—

No. 18110

Edward Morgan MacKenna,
Appellant,

versus

O. B. Ellis, Director, Texas Department of Corrections,
Appellee.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court with directions to grant the writ and discharge the petitioner;

It is further ordered and adjudged that the appellee, O. B. Ellis, Director, Texas Department of Corrections, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

"Cameron, Circuit Judge, dissenting."

Appendix "E"

IN THE

UNITED STATES COURT OF APEALS

FOR THE FIFTH CIRCUIT

No. 18110

Edward Morgan MacKenna,
Appellant,

versus

O. B. Ellis, Director, Texas Department of Corrections,
Appellee.

Appeal from the United States District Court for the Southern District of Texas.

(May 2, 1961.)

On REHEARING BEFORE THE COURT EN BANC.

Before Tuttle, Chief Judge, and Hutcheson, Rives, Cameron, Jones, Brown and Wisdom, Circuit Judges.

PER CURIAM: On the Court's own motion, our decision reported as *MacKenna v. Ellis*, 1960, 280 F.2d 592, has been considered on rehearing before

the Court *en banc*. The opinion and decision are modified in one respect only.

In lieu of the directions at the conclusion of the opinion as quoted in the margin[1], the following is substituted:

The judgment is therefore reversed and the cause remanded with directions to grant the writ, vacate the judgment of conviction, and make such disposition of the petitioner as law and justice may require at the time of the entry of the final order.[2]

Reversed and remanded with directions.

HUTCHESON, Circuit Judge Dissenting:

When MacKenna was here on his first appeal from the order of the district judge, denying his petition for habeas corpus as without merit on its face, I dissented from the opinion of the majority, reported in 263 F(2) 35, which, reversing the judgment, required the district judge to hold a hearing on the facts. In that dissent I pointed out that, as

[1] "The judgment is therefore reversed and the cause remanded with directions to grant the writ and discharge the petitioner. See 28 U.S.C.A. Section 2106.

"Reversed and Remanded with directions." 280 F.2d at pp. 604, 605.

[2] See 28 U.S.C.A. §2106; United States ex rel Almeida v. Baldi, 3 Cir., 1952, 195 F.2d 815, 825; Mitchell v. Young, 4 Cir., 1942, 130 F.2d 880, 882; 15 Am. Jur., Criminal Law, §364; 25 Am. Jur. Habeas Corpus, §157; 22 C.J.S. Criminal Law, §§266, 267; 39 C.J.S. Habeas Corpus, §102.

plainly appeared from the statement of them in the opinion, the claims asserted were merely claims of error which under settled law in this circuit and elsewhere must be asserted not by habeas corpus but by appeal, and that, as grounds for the extraordinary relief of habeas corpus, they were wholly insufficient, indeed patently frivolous. I pointed out also, as strongly as I could, that this was another of the growing number of cases in which federal appellate courts, asserting a kind of moral and legal superiority over state courts and the proceedings in them in respect to criminal trials which they do not have, seek to exercise a suzerainty and hegemony over state courts which, under our federal system they do not in law have and, if we are to continue to preserve and hold to our federal system, they cannot in law and in fact exercise.

Now when MacKenna is here again, the appeal this time from a full trial of the issues tendered in the district court and with a thorough going opinion by the district judge finding the appellant's claim in fact without support in the evidence, I am the more convinced that, as a profound believer in the federal constitutional principles which have long governed and which, despite the inroads apparently made on them by some of the decisions of the Supreme Court, still govern us, I must again dissent in order to point out for the benefit of those who, as I do, still believe in our federal system of government and the principles which underlie it, the complete abandonment of those principles, as they affect the relation of state and federal courts, evidenced

by the opinion and action of the majority of the court in this case.

My purpose here, then, will be, reaffirming my earlier dissent and approving and adopting the dissenting opinion of Judge Cameron, 280 S(2) at page 605, et seq, to assert as strongly and show as well as I can, that the opinion of the majority in this case, reported in 280 F(2) at 592, declining to accept the findings and reversing the judgment of the district judge, is contrary to established federal constitutional principles.

I realize that its free and easy approach to the exercise of a supervisory jurisdiction which, under settled principles is prohibited and denied to the federal courts,[1] the majority feels that it is exercising a kind of supernal power which, deriving from some source not made clear, authorizes the court to abandon the principles governing relief by habeas corpus and enables, indeed requires, it to afford a state prisoner, held under a judgment of a state court, the right and opportunity to retry his case and secure relief in the federal courts on mere allegations that error was committed on his trial.

Thus the majority opinion in this case in effect holds that the mere complaint by the applicant that he has been deprived of due process puts the burden on the state to show affirmatively that he has not been so deprived. In short, speaking from the ivory tower of the federal court of appeals, the majority

[1] Smith v. Alabama, 124 U.S. 463. Muller v. Oregon, 208 U.S. 413.

rejecting the careful and considered findings of the district judge that the claims made are not supported by the evidence, declares in effect that the trial in the state court is rendered nugatory and invalid by the mere attack upon it, a view which, with deference, reverses the real position of state and convict in a case where a prisoner has been tried and convicted and is held under a final judgment of a state court of admitted criminal jurisdiction, which judgment has been affirmed on appeal by the highest state criminal court.

The majority, recognizing and declaring that there is general abuse of federal habeas corpus by state prisoners, yet in effect condones and extends that abuse by reversing the considered findings of the district judge entered after a full hearing before him where he had opportunity to consider and determine and did consider and determine the credibility of the witnesses and the truth of the claims made by the applicant. In the face of these findings, the majority opinion in effect proceeds upon the view that the mere attack upon established state court procedures places upon the state the burden of establishing, to the satisfaction of the appellate court, that the attack is ill-founded instead of upon the applicant to state and establish the facts necessary to entitle him to such relief.

Further, in its opinion the majority refuses to accept the effect of the undisputed facts that defendant was found in possession of recently stolen property and that no reasonable believable or even

plausible explanation of such posession was given by him.

The district judge, on full evidence and on a record amply sustaining his findings, heard and determined against the appellant all the issues of fact put forward by him. The state made ample proof of MacKenna's guilt, and nothing that MacKenna complains of here proves or has any tendency to prove, that he was an innocent man, that, in short, he was unfairly convicted of something he did not do and, therefore, was deprived of rights justifying relief by habeas corpus.

With great personal deference, I cannot refrain from saying that a reading and re-reading of the opinion in this Case originally reported in 280 F(2) 592, which, with the one exception noted in the majority opinion of the court en banc, is now adopted by it, shows that this is just another case of personal decreeing in which the judges writing the opinion have in effect taken as the reason for their action not settled legal principles but their feeling *that the defendant, an eight times recidivist, has been too severely punished, that is was given too long a sentence, a feeling which, possibly proper enough as a personal feeling, has no place in their judgment.* If state courts, on which the burden of most criminal litigation rests, must, as the majority seems to think, conduct their case in such a manner as to satisfy in each case the personal views of justice of particular federal judges who happen to review their proceedings, rather than so as to conform them to basic state and federal constitutional

principles, the States and their courts will be indeed reduced to a parlous state, and the federal union will be no more.

In what I have said, I have not intended to be personally censorious. For my colleagues, as individuals, I have only the highest respect and affection. I have written what I have written under the pressure of the heavy feelings that what is done in this case must not be allowed to remain hidden under a bushed but must be brought clearly out into the open so that if the federal courts persist in reducing state courts to the low position to which the opinion reduces them, the Congress may see fit by more compelling legislation to come to the aid of both state and federal courts. Insisting, that there is no warrant in the record for reversing the district judge's order denying the writ and that the judgment appealed from must be affirmed, I vigorously dissent from its reversal.

Cameron, Circuit Judge, joins in the foreoging. dissent.

JONES, Circuit Judge Dissenting:

I am not persuaded that the appellant was deprived of any right guaranteed to him by the Federal Constitution and so am unable to join in the conclusion that the District court's judgment was erroneous. Nor am I convinced that, because more than half of his sentence has been served, this Court

has the power to revise that sentence and terminate it by ordering the appellant to be discharged. The reasons for these views are set forth in the dissenting opinions of Judges Hutcheson and Cameron and need not be amplified here.

Appendix "F"

IN THE

UNITED STATES COURT OF APEALS

FOR THE FIFTH CIRCUIT

No. 18110

Edward Morgan MacKenna,
Appellant,

versus

O. B. Ellis, Director, Texas Department of Corrections,
Appellee.

Appeal from the United States District Court for the Southern District of Texas.

Before Tuttle, Chief Judge, and Hutcheson, Rives, Cameron, Jones Brown and Wisdom, Circuit Judges.

MODIFIED JUDGMENT ON REHEARING EN BANC

IT IS ORDERED by the Court that the opinion and judgment rendered and entered on June 22, 1960

be, and the same are hereby modified in accordance with the opinion on rehearing en banc this day rendered.

"Hutcheson, Cameron and Jones, Circuit Judges, dissenting."

Issue: May 2, 1961

Appendix "G"

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

EDWARD MORGAN MacKENNA,
Appellant,

versus

O. B. ELLIS, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS,
Appellee.

No. 18,110

ON CONSIDERATION OF THE APPLICATION of the Appellee in the above numbered and entitled cause for a stay of the mandate of this court therein, to enable Appellee to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, IT IS ORDERDED that the issue of the mandate of this court in said cause be and the same is stayed for a period of thirty days; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from the date of this order there shall be filed with the clerk of this court the certificate of the clerk of the Supreme Court that certiorari petition and record have been filed. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court

denying the writ, or upon the expiration of thirty days from the date of this order, unless the above-mentioned certificate shall be filed with the clerk of this court within that time.

DONE AT NEW ORDEANS, LA., this 26th day of May, 1961.

/s/ RICHARD T. RIVES,

United States Circuit Judge.

ORDER STAYING MANDATE, FILED: May 26, 1961.